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Equitable Relief Against Nuisances and Similar Wrongs in Missouri

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Equitable Relief Against Nuisances and Similar Wrongs In Missouri[1]

I. Private Nuisance.

Definition. In order the better to secure to the owner and occupier of land its proper use and enjoyment the common law has recognized certain rights in addition to the mere right of possession which is redressed by the action of trespass. These non-possessory rights are called natural rights because, like the right of possession, they exist irrespective of the consent of others.[2] These natural rights have been summarized as follows:[3]

(1) To have the air free from unreasonable pollution by

[1]The substance of this article will appear shortly in a book on Equity with notes on Missouri cases and is used here with the permission of the publishers.

[2]And are thus distinguished from consensual rights; easements and profits are usually consensual but may be acquired by prescription.

[3]Tiffany, Real Property p. 649. The list is not entirely complete: for example, the storing of large quantities of dangerous explosives in close proximity to a dwelling is a nuisance; *French* v. *Mfg. Co.* (1913) 173 Mo. App. 220, 226, 158 S. W. 720; *Liggett* v. *Powder Mfg. Co.* (1917) 274 Mo. 115, 119, 202 S. W. 372; or the use of such explosives in a thickly populated community. *Blackford* v. *Herman Co.* (1908) 132 Mo. App. 157, 163, 112 S. W. 287.

[4]*Cooke* v. *Forbes* (1867) 5 Eq. Cas. 106 (ammonia fumes); *Kirchgraber* v. *Lloyd* (1894) 59 Mo. App. 59 (vapors and smoke from brick kiln); *Sultan* v. *Parker-Washington Co.* (1906) 117 Mo. App. 636, 644, 93 S. W. 289 (fumes from asphalt plant); *Bielman* v. *R. R.* (1892) 50 Mo. App. 151 (stock yards). See also *St. Louis Safe Deposit Co.* v.

disagreeable vapors[4] and odors[5] and also free from unreasonable noise.[6]

(2) To have water in a natural watercourse flow past his land without diminution,[7] deterioration,[8] or alteration[9] by acts on the part of others.

Kennett Est. (1903) 101 Mo. App. 370, 374, 74 S. W. 474 (heat from smoke stack).

[5]*Ill. Cent. R. R. Co.* v. *Grabill* (1869) 50 Ill. 241 (odor from cattle pens); *Zugg* v. *Arnold* (1898) 75 Mo. App. 68 (odors from slaughter house); *Danker* v. *Goodwin Mfg. Co.* (1903) 102 Mo. App. 723, 730, 77 S. W. 338. (stenches from candle factory); *Desberger* v. *University Heights Co.* (1907) 126 Mo. App. 206, 218, 102 S. W. 1060 (sewage); *Gorman* v. *R. R.* (1912) 166 Mo. App. 320, 328, 148 S. W. 1009 (filth from privies). That an ordinary pond is not a nuisance see *Holke* v. *Herman* (1900) 87 Mo. App. 125, 134.

[6]*Soltau* v. *De Held* (1851) 2 Sim. (N. S.) 133 (bell ringing); *Leete* v. *Pilgrim Cong'l. Soc'y* (1884) 14 Mo. App. 590 (bell ringing); *McNulty* v. *Miller* (1912) 167 Mo. App. 134, 151 S. W. 208; *Hayden* v. *Tucker*, (1866) 37 Mo. 214, 217 (stallions and jacks kept for breeding purposes); *Tarkio* v. *Miller* (1912) 167 Mo. App. 122, 151 S. W. 208 (ditto)

[7]*Corning* v. *Winslow* (1869) 40 N. Y. 191 (diversion of waters from their natural channel, thus interfering with plaintiff's use of water for power).

[8]*Lingwood* v. *Stowmarket Co.* (1865) 1 Eq. Cas. 77 (refuse of paper mill discharged into a river); *Schumacher* v. *Shawhan* (1902) 93 Mo. App. 573, 578, 67 S. W. 717 (refuse from distillery); *Hanlin* v. *Burk Bros.* (1913) 174 Mo. App. 462, 160 S. W. 547 (pollution of stream); *Joplin Mining Co.* v. *Joplin* (1894) 124 Mo. 129, 135, 27 S. W. 406. (sewage).

[9]*McCormack* v. *Horan* (1880) 81 N. Y. 86 (dam causing flowage over land of an upper proprietor). Where the defendant's act is direct—as, for example, where he desires the particular result—it would seem that trespass would lie; but the distinction between direct and indirect acts is a troublesome one of degree and flowage cases are apparently classified under nuisances. Whether the tort is trespass or nuisance makes little or no difference in equity. *Codman* v. *Evans* (1863) 7 Allen (Mass.) 431. See also *Pixley* v. *Clark* (1866) 35 N. Y. 520 (obstruction injurying land by percolation; *King* v. *Tiffany* (1832) 9 Conn. 162 (obstruction interfering with operation of a mill up stream); *George* v. *Wabash etc. Ry.* (1890) 40 Mo. App. 433, 445; *Desberger* v. *University Heights Co.* (1907) 126 Mo. App. 206, 219, 102 S. W. 1060.

(3) In some states, to discharge water on adjacent land.[10]

(4) In a few jurisdictions, to be free from injury by the escape of water artificially collected on another's land.[11]

(5) To have his land supported by adjacent [12] and subjacent [13] land.

Any violation of these natural rights[14] is called a private nuisance.[15]

[10]*McDaniel* v. *Cummings* (1890) 83 Cal. 515. This is the rule of the civil law. For the "common law rule" *contra,* see *Garrison* v. *Hargadon* (1865) 10 Allen (Mass.) 106; Tiffany, Real Property sec. 298, page 664. The "common law rule" seems to prevail in Missouri; *Collier* v. *C. & A. R. R.* (1892) 48 Mo. App. 398, 402 and cases cited; *Goettentroeter* v. *Kuppelman* (1899) 83 Mo. App. 290, 293; *Beauchamp* v. *Taylor* (1908) 132 Mo. App. 92, 96, 111 S. W. 609.

[11]If the one collecting the water is negligent in allowing it to escape he is of course liable on ordinary tort principles of negligence. In England he has been held liable at peril for the escape; *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, but the rule has not been followed extensively in this country, and the tendency of later English cases has been to restrict the scope of the decision. It may be questioned whether such a collecting of water is such a private nuisance as would ever be enjoined. See *Weishar* v. *Sheridan* (1912) 168 Mo. App. 181, 184, 153 S. W. 64; *Grant* v. *R. R.* (1910) 149 Mo. App. 306, 310, 130 S. W. 80, *Grimes* v. *R. R.* (1914) 184 Mo. App. 117, 122, 168 S. W. 318. And see also University of Mo. Bulletin Law Series 8, Page 20.

[12]*Wyatt* v. *Harrison* (1832) 2 Barn. & Adol. 871, Tiffany, Real Property Sec. 301. *Victor Mining Co.* v. *Morning Star Mining Co.* (1892) 50 Mo. App. 525, 530.

[13]*Humphries* v. *Brogden* (1850) 12 Q. B. 739; Tiffany, Real Property. Sec. 302; *C. & A. R. R.* v. *Brandow* (1899) 81 Mo. App. 1, 8; *Kansas City etc., R. R. Co.* v. *Sandlin* (1913) 173 Mo. App. 384, 393, 158 S. W. 857.

[14]The reader is reminded that legal rights are historically the product of legal remedies and not *vice versa;* hence these natural rights exist because the law has in these cases given a remedy.

[15]The word "nuisance" means literally nothing more than wrongful harm and it is not always used in the narrow, specialized sense attached to it by Tiffany. For the sake of clearness and definiteness it will be used in this article in the narrow sense unless otherwise indicated.

Remedies. Since a private nuisance does not involve direct interference wth possession the appropriate common law remedy is not the action of trespass but an action on the case;[16] in this action the plaintiff ordinarily[17] recovers for any damage he may have suffered down to the date of bringing his action. But if the nuisance consists of a permanent structure the weight of authority in this country is that he not only may[18] but must recover prospective damages also.[19] This amounts, in substance, to an informal eminent domain, the plaintiff being thus paid by the judgment for an easement which the defendant thereby ac-

[16]The early common law remedies of *assize of nuisance* and *quod permittat prosternere* had already become obsolete by the time of Blackstone having been superseded by the action on the case; Bl. Comm. Book III, 220. In both the early actions the plaintiff was able to get a judgment not only for damages but for abatement also, but they were much circumscribed in other particulars. Both required that the plaintiff have a freehold interest in the land damaged and the *assize of nuisance* lay only against the wrongdoer; the *quod permittat prosternere* lay, also, however, against an alienee who continued the nuisance. *Jarvis* v. *St. Louis etc. R. R.* (1887) 26 Mo. App. 253, 257 (leaving carcass of cow unburied.)

[17]See 61 U. of Pa. Law Rev. 614. *Dickson* v. *R. R.* (1880) 71 Mo. 576, 579 (crops destroyed for two years by overflow); *Van Hoozier* v. *St. Joseph R. R.* (1879) 70 Mo. 145, 148; *Hudson* v. *Burk* (1891) 48 Mo. App. 314, 317; *McKee* v. *St. Louis etc. R. R.* (1892) 49 Mo. App. 174, 182; *Bielman* v. *R. R.* (1892) 50 Mo. App. 151, 156; *Long* v. *Kansas City* (1904) 107 Mo. App. 533, 538, 81 S. W. 909.

[18]In a few jurisdictions the plaintiff may elect; *Danielly* v. *Cheeves* (1894) 94 Ga. 263, 21 S. E. 524; *City of North Vernon* v. *Voegler* (1885) 103 Ind. 314, 2 N. E. 821.

[19]See Sedgwick, Damages, 9th ed. sec. 95. For a criticism of this prevailing view see 2 Cal. Law Rev. 248-250. The points urged are briefly as follows: (1) It permits an easement to be acquired without formal condemnation for a private use, because a complete recovery bars all subsequent actions; (2) the easement may be created within a period less than the period of prescription; (3) in order that a subsequent purchaser shall find out the existence of the easement he must search the record for actions brought by previous owners of the land; (4) the rule encourages litigation because a plaintiff whose present damage is slight will be compelled to sue because the running of the statute of limita-

quires. The common law also allows the party injured to abate it;[20] in case of emergency such a privilege is often of great importance.

Altho the jurisdiction of equity for the specific reparation and prevention of private nuisance is of comparatively modern growth, it has come now to furnish the most usual remedy. Where the plaintiff could have recovered substantial damages at law equity will usually order the defendant to abate the nuisance.[21] Such a remedy is ordinarily more advantageous than the common law action for damages, because if the plaintiff recovers

tions will bar him entirely; and a defendant is compelled to pay for a permanent injury tho he might later remove the cause of the damage; (5) it raises the difficult question of what is and what is not a permanent nuisance. See also 8 Mich. Law Rev. 227; 11 Harv. Law Rev. 277; 9 Col. Law Rev. 538. *Markt* v. *Davis* (1891) 46 Mo. App. 272, 274; *Dickson* v. *C. R. & P. R. R.* (1880) 71 Mo. 575, 579, *dictum*; *Scott* v. *City of Nevada* (1893) 56 Mo. App. 189, 191; *Hanlin* v. *Burke Bros.* (1913) 174 Mo. App. 462, 468, 160 S. W. 547 (well entirely destroyed). And see *Hayes* v. *R. R.* (1913) 177 Mo. App. 201, 217, 162 S. W. 266; *Babb* v. *Curators* (1890) 40 Mo. App. 173, 178 (permanent injury to market value by sewer, not removed by removal of sewer). In *Smith* v. *Sedalia* (1912) 244 Mo. 107, 123, 149 S. W. 597 it was held that the plaintiff could not collect prospective damages for the turning of sewage into a creek upon plaintiff's farm and also get an injunction.

[20]He may destroy property in thus abating if it is the only reasonable and feasible method of achieving the result. *Brill* v. *Flagler* (1840) 23 Wend. 354 (dog that disturbed by incessant barking and howling at night). But he cannot lawfully abate unless he can do so peaceably. *Mohr* v. *Gault* (1860) 10 Wis. 513. *City of Chillicothe v. Bryan* (1903) 103 Mo. App. 409, 414, 77 S. W. 465 (liable for excess in abating). See also *Allison* v. *City of Richmond* (1892) 51 Mo. App. 133, 136 (city has no power to order destruction of frame building merely because it was in a dangerous situation, and annoying to the public).

[21]*Crump* v. *Lambert* (1867) L. R. Eq. 409. The exceptions to this rule will be discussed *post* pp. 22-26. *Paddock* v. *Somes* (1890) 102 Mo. 226, 240, 14 S. W. 746 (injunction granted as of course if proved nuisance is of continuous or constantly recurring character); *Fischer* v. *R. R.* (1908) 135 Mo. App. 37, 41, 115 S. W. 477; *Baker* v. *McDaniel* (1903) 178 Mo. 447, 467, 77 S. W. 531.

The plaintiff may in the same suit get an injunction and damages

damages only to the date of the action he will be compelled to bring an action every few years to prevent the acquistion of an easement;[22] and if he recovers prospective damages also his land becomes subject to an easement at once.

Moreover, the equitable remedy is preferable to private abatement because: (1) if the injured party abates he loses his right to sue for the damage already suffered,[23] whereas if he gets an injunction in equity he may get as incidental thereto compensation for past damages; (2) the injured party cannot abate if the nuisance is only threatened [24] but such an objection would not ordinarily defeat an injunction;[25] (3) one who abates takes the risk of being able to show that there really was a nuisance and that in abating he did nothing which was not reasonably necessary to his protection;[26] if he fails to do this he himself becomes a tort feasor. A court of equity, on the other hand, places the burden of abating upon the defendant with no risk to the plaintiff.

Essential elements—test. In order to constitute a nuisance

down to the date of bringing the action; *Whipple* v. *McIntyre* (1896) 69 Mo. App. 397 (pig sty).

And injunction will not issue if the danger is merely speculative; *St. Louis etc. R. R.* v. *Schneider* (1888) 30 Mo. App. 620, 637; *Holke* v. *Herman* (1900) 87 Mo. App. 125, 135; *Lester Real Estate Co.* v. *City of St. Louis* (1902) 169 Mo. 227, 235, 69 S. W. 300. On the other hand, it is not necessary to wait till damage is inflicted; *Wood* v. *Craig* (1908) 133 Mo. App. 548, 552, 113 S. W. 676; *Mason* v. *Deitering* (1908) 132 Mo. App. 26, 34, 111 S. W. 862; *Caskey* v. *Edwards* (1907) 128 Mo. App. 237, 244, 107 S. W. 37.

The mere fact that a city ordinance makes a thing unlawful is not enough to obtain an injunction; *Warren* v. *Cavanaugh* (1883) 33 Mo. App. 102, 108.

[22]Unless the recovery of the judgment at law overcomes the obstinacy of the other party and induces him to abate the nuisance.

[23]Baten's Case (1611) 9 Co. Rep. 53 b, 54 b.

[24]*Gates* v. *Blincoe* (1834) 2 Dan. (Ky.) 158.

[25]Unless it is fairly clear that the plaintiff is in no imminent danger. *Fletcher* v. *Bealy* (1885) 28 Ch. D. 188, vat wash emptied by the defendant into the river would not injure the plaintiff for some time.

[26]*State* v. *Moffett* (1848) 1 G. Greene 247.

the injury complained of must have been caused by the act of some human being; if it is the result of natural causes to which the act of man has not contributed, the plaintiff is without remedy either at law or in equity. In *Roberts* v. *Harrison*[27] a petition was filed for the removal of a pond that had collected on the defendant's land. Relief was denied because "the accumulation of water was due to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. . . . The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek, due entirely to causes over which the defendant had no control."

Furthermore, even if the damage had been caused by the defendant's act, he may escape liability if the social interest in the doing of the act is sufficiently great to justify it and the damage caused thereby. In *Middlesex Co.* v. *McCue*[28] the plaintiff asked that the defendant be restrained from filling the plaintiff's mill pond. The defendant owned and cultivated in the ordinary way land upon the side of a hill sloping down to the pond. On account of the great importance of having land cultivated relief was denied:[29] "Liability depends upon the nature of the act and of the kind and degree of harm done, considered in the light of expediency and usage. . . . [The plaintiff] complains not that substances brought down are offensive, but that the defendant caused any solid substances to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is

[27](1897) 101 Ga. 773, 28 S. E. 995. See 12 Harv. Law Rev. 63; *Mohr* v. *Gault* (1860) 10 Wis. 513.

[28](1889) 149 Mass. 103, 21 N. E. 230.

[29]See also *Giles* v. *Walker* (1890) 24 Q. B. D. 656, cultivation of forest land caused thistles to grow and spread their seed to adjoining land. It seems fairly clear that by legislation under the police power, a duty might be imposed upon the land occupier in such cases and perhaps even in a case like *Roberts* v. *Harrison, supra.*

made friable by digging. . . . We are of the opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may."[80]

If the alleged nuisance consists of interference with health and comfort, the test is what is reasonable under all the circumstances according to the standard of people generally. In *Rogers* v. *Elliott*[81] the plaintiff complained of the ringing of a bell in a church just across from the residence of his father, with whom the plaintiff lived. The latter had suffered a sunstroke and because of this he was thrown into convulsions every time the bell was rung. It was held proper to direct a verdict for the defendant: "A fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. . . . The inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the

[80]Another case involving the social interest in the improvement of land is *Falloon* v. *Schilling* (1883) 29 Kan. 292. In that case the plaintiff's petition alleged that in order to compel the plaintiff to sell to the defendant a piece of land at the defendant's price ,the latter threatened to put upon his own land small tenement houses and rent them to negroes, and had actually erected one house and rented 't to a negro family, to the great annoyance etc. of the plaintiff. The demurrer to the petition was sustained on the ground that the size of the buildings was a matter for the defendant to determine and that "the law makes no distinction on account of race or color and recognizes no prejudices arising therefrom. As long as that neighbor's family 's well behaved, it matters not what the color, race or habits may be, or how offensive personally or socially it may be to the plaintiff; plaintiff has no cause of action in the courts."

[81](1888) 146 Mass. 349, 15 N. E. 768.

importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally and not upon those on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbance without suffering; nor upon those whose mental or physical condition makes them painfully sensitive to everything about them."

Damage. Where the alleged nuisance consists of an interference with personal comfort no tort is proved unless substantial damage is shown[32]. But where the alleged nuisance consists of an injury to land or to the beneficial use thereof there has been a strong tendency to regard the plaintiff's right as actionable without proof of any damage. In *Mann* v. *Willey*[33] the plaintiff complained that the defendant, an upper riparian proprietor, had polluted the water of Gulf Brook by discharging all the sewage from his hotel into it. The only use to which the plaintiff had ever put the water was for bathing and turning a turbine wheel and the defendant contended that since for such purposes the water was in no way injured there was no tort and the plaintiff was not entitled to an injunction. This contention was held unsound: "That the discharge of such sewage into the stream does pollute and render it unfit for domestic purposes cannot be doubted, and is, we think, established by the evidence, and even though the plaintiff has not as yet put the water[34] to such a use, she had the right to the stream in its natural purity. . . . And that right was not conditioned upon the beneficial user of it. . . . And she was entitled to equitable re-

[32] *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642, 650.

[33] (1900) 51 N. Y. App. Div. 109, 1 Ames Eq. Cas. 572.

[34] Most of the cases holding the plaintiff's right to be technical have been cases of water rights, but *Dana* v. *Valentine* (1842) 5 Metc. 8, was the case of a slaughter house and *Farley* v. *Gate City Gas Light Co.* (1898) 105 Ga. 323, 31 S. E. 192, the plaintiff complained of gas and noxious vapors.

lief against the defendant for interfering with it though the damages were merely nominal." [35]

Wherever the natural right is thus held to be technical,[36]

[35]See *contra, Strugis* v. *Bridgman* (1879) 11 Ch. Div. 852. The defendant was a confectioner and for twenty-six years used on his premises pestles and mortars for breaking up and pounding hard substances. The plaintiff, a physician, built his consulting room against the defendant's wall and the noise and vibration of operating the pestles and mortars interfered with his practice. In answer to a suit for an injunction the defendant set up prescription but the court decided against this contention on the ground that the plaintiff had no cause of action till he suffered damage. But see *Roberts* v. *Gwyrfai District Council* (1899) 1 Ch. D. 583, adopting the prevailing American doctrine in a case of altering the current of a stream; 13 Harv. Law Review 142. In *Howard Co.* v. *R. R.* (1895) 130 Mo. 652, 32 S. W. 651, a distinction was taken between a case where the damage can be measured once for all at the time of the creation of the alleged nuisance and a case where the amount of damage depends upon future events, holding that only in the former case does the prescriptive period begin at once; see 4 Harv. Law Rev. 435. *Paddock* v. *Somes* (1890) 102 Mo. 226, 240, 14 S. W. 746: "and courts of equity will more readily interpose in such instances where the damages recovered are merely nominal, and therefore inadequate to prevent a repetition of the injury." *Freudenstein* v. *Heine* (1878) 6 Mo. App. 287, 289: "It is not essential to a recovery that plaintiff should prove actual damage."

[36]The reasons given as to whether the right should be considered a technical right are usually unsatisfactory. In *Farley* v. *Gate City Gas-Light Co. supra,* the court gave the fictitious reason that "the law imports damages" which is only another way of saying that it is unnecessary to prove any damage and does not answer the question at all. The real question is a rather difficult one of balancing of interests. In *Sturgis* v. *Bridgman, supra;* "It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand, in an equal degree unjust, and from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption and which the law gives no power to prevent." See also 22 Harv. Law Rev. 128: "The general adoption of such a rule (holding damage unnecessary) would entail a constant watchfulness by

equity will prevent its violation[37] as the most satisfactory method[38] of preventing the acquisition of an easement by prescription.[39]

Legalizing nuisances. Since England has no written constitution Parliament has power to legalize any nuisance whatever; but the statutory authorization of a business is not construed as legalizing a nuisance if the business can be carried on without creating one.[40] In the United States such legislation is usually unconstitutional as within the prohibition against depriving a

land owners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property." On the other hand, see 13 Harv. Law Rev. 142: "While it is hard for one who at present does not wish to use his land in a certain way to be deprived of its future use, it is harder still for one committing the nuisance to be driven out of business simply because a neighboring proprietor decides to change his mode of occupation. It would be in the power of the latter to destroy at his option permanent and extensive works." See 12 Harv. Law Rev. 284.

[37]*Amsterdam Knitting Co.* v. *Dean* (1900) 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Cas. 573 (diversion of water): "Where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, tho no actual damage is shown or found."

[38]But see *Dana* v. *Valentine* (1842) 5 Metc. 8: "And there seems to be no good reason to doubt, if the plaintiffs can maintain an action at law, they may obtain an adequate remedy without any interposition of a court of equity." Just what the court had in mind is not clear. The plaintiff could, of course, prevent the acquiring of an easement by suing at law just before the expiration of any statutory period.

[39]It seems to be well settled that no prescriptive right to maintain a public nuisance can be acquired. *Mills* v. *Hall* (1832) 9 Wend. (N. Y.) 315. Where, however, the nuisance is a purely private one, the rule seems to be that prescription does apply; *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642. But, as pointed out by Wood, Nuisance Sec. 712, where the nuisance consists of polluting the atmosphere, as in *Campbell* v. *Seaman* (1876) 63 N. Y. 568, it is very difficult to establish a user for the requisite period.

[40]*Shelfer* v. *City of London Lighting Co.* (1895) 1 Ch. D. 287, 1 Ames Eq. Cas. 589: "It is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. . . . . The defendants have

person of his property without due process of law or against taking private property for public use without compensation.[41] It has been suggested, however, that such a prohibition applies only to grave and serious nuisances, and that small nuisances may be legalized as a proper exercise of the police power of the state.[42] If the statute authorizing the nuisance is valid,[43] both legal and equitable relief are barred.

Culpability of defendant. Liability for private nuisance dates back to a time when apparently all tort liability was absolute, not dependent upon any culpability or blameworthiness on the part of the defendant: "He that is damaged ought to be recompensed."[44] This liability at peril has very largely persisted where injuries to property rather than injuries to the person have been concerned, irrespective of the form of action involved.[45] Hence a defendant may be liable for the creation of a nuisance tho done without his knowledge or consent by an independent

not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station." See *State* v. *Board of Health* (1884) 16 Mo. App. 8, 12: "A nuisance is not the necessary result of burning brick; and where a nuisance is not the necessary result of the work authorized, legislative authority to create a nuisance will not be inferred from any license or authority to carry on the work, and legislative authority merely to carry on the work will not be a valid defense to a public prosecution or to a private action for a nuisance created in carrying it on."

[41]U. S. Constitutional Amendments 5 and 14. See *Sultan* v. *Parker-Washington Co.* (1906) 117 Mo. App. 636, 643, 93 S. W. 289; "Municipal authority for so great an annoyance (asphalt plant) will not legalize its existence, unless it is reasonably necessary for the common weal."

[42]*Sawyer* v. *Davis* (1884) 136 Mass. 239: "Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good."

[43]See 14 Col. Law Rev. 590, 610 as to the effect of legislation and state constitutional provisions authorizing the operation of railways.

[44]See *Basley* v. *Clarkson* (1681) 3 Levinz 37: "His intention and knowledge are not traversable; they cannot be known."

[45]See 59 U. of Pa. Law Rev. 298, 309, 310.

contractor who has been carefully selected.[46] Where, however, the defendant is a vendee[47] of land upon which a nuisance has been already created[48] he becomes liable only upon principles of negligence,[49] being entitled to a reasonable oppor-

[46]*Storrs* v. *Utica* (1858) 17 N. Y. 104 (constructing sewer through street.) And if the structure erected by the defendant does not prove to be a nuisance until later he is not entitled to any notice to abate; *Bowner* v. *Welborn* (1849) 7 Ga. 296: *"Eo instante* in which the use of his property becomes injurious to another, it is a nuisance and he is liable in damages. This liability depends upon no other fact or circumstances—if the nuisance exists, if the damage is proven, the law, without more, attaches to him the liability." See also *Vile* v. *Pa. R. R. Co.* (1914) 246 Pa. 35, 91 Atl. 1049. See *Matthews* v. *Mo. Pac. R. R.* (1887) 26 Mo. App. 75, 80 (erecting obstruction in public highway—liable without proof of negligence); *Haynor* v. *Excelsior Springs, etc. Co.* (1907) 128 Mo. App. 691, 697, 108 S. W. 580 (liable tho not negligent); *Martin* v. *St. Joseph* (1909) 136 Mo. App. 316, 321, 117 S. W. 96: "If the embankment proved a nuisance, ... it was immaterial whether the city exercised due care etc."

[47]That the creator of the nuisance does not escape liability merely by selling or leasing his land, see *Plumer* v. *Harper* (1824) 3 N. H. 88. But a landlord is not liable for a nuisance created by his tenant unless he expressly or impliedly authorized it; *Edgar* v. *Walker* (1898) 106 Ga. 454, 32 S. E. 582. *Grogan* v. *Broadway Foundry Co.* (1884) 14 Mo. App. 587 (owner of premises demised to tenant for years not liable for a nuisance created and maintained by tenant); *Padberg* v. *Kennerly* (1885) 16 Mo. App. 556 (landlord who renews a letting from month to month of premises upon which there is a nuisance, is liable); *Gilliland* v. *C. & A. R. R.* (1885) 19 Mo. App. 411, 416 (landlord liable if nuisance is such as necessarily arises from tenant's ordinary use of premises for purpose for which they were let and not avoidable by reasonable care on part of the tenant); *O'Brien* v. *Heman* (1915) 191 Mo. App. 477, 499, 177 S. W. 805 (landlord and tenant both liable); *Mancusco* v. *Kansas City* (1898) 74 Mo. App. 138, 144.

[48]Where the defendant has erected a nuisance on land belonging to a third party it is no defense that the defendant's removal of the nuisance will expose him to liability to such third party; *Thompson* v. *Gibson* (1841) 7 M. & W. 456.

[49]*Hayes* v. *Brooklyn Heights R. R. Co.* (1910) 200 N. Y. 183, 93 N. E. 409; *Hulett* v. *M. K. & T. R. R.* (1899) 80 Mo. App. 87, 90; *Graves* v. *R. R.* (1908) 133 Mo. App. 91, 98, 112 S. W. 736; *Wayland* v. *R. R.* (1862) 75 Mo. 548, 556.

tunity to abate the nuisance after knowledge of its existence.[50]

Where the damage caused to the plaintiff by a nuisance is purely personal—having no reference to any injured land[51]—such as injuries to the health of persons having no property interests affected by the nuisance, there is a square conflict of authority as to whether defendant's liability is at peril[52] or only for negligence.[53]

[50]It is usually said that the grantee is entitled to notice to abate before becoming liable for the continuance of the nuisance; *Jones* v. *Williams* (1843) 11 M & W 176; *Pierson* v. *Glean* (1833) 14 N. J. Law 36; But apparently knowledge from any source would be enough; see *Leakan* v. *Cochran* (1901) 178 Mass. 56, 60 N. E. 382. Similarly, where an injunction has been issued against the previous owner's maintaining a nuisance, it would seem that the vendee should not be held guilty of contempt till he had knowledge of the injunction; 21 Harv. Law Rev. 220; criticising *State* v. *Porter* (1907) 76 Kan. 411; 91 Pac. 1073. *McGowan* v. *Mo. Pac. R. R.* (1886) 23 Mo. App. 203, 208; *O'Brien* v. *Burroughs Co.* (1915) 191 Mo. App. 501, 507, 177 S. W. 811.

[51]Where the damage complained of is damage to land, the plaintiff must show some interest in the land; see *Miller* v. *Edison Elec. Illuminating Co.* (1901) 68 N. Y. Supp. 900; (lodgers in hotel disturbed by vibration). On the right of a reversioner to complain of a nuisance see 19 Harv. Law Rev. 541. If the defendant has acted intentionally or negligently in creating or maintaining a nuisance he is liable to any one injured thereby without reference to the plaintiff's interest in the land. *Clarke* v. *Thatcher* (1881) 9 Mo. App. 436, 438 (tenant from month to month not entitled to injunction). In *Whalen* v. *Baker* (1891) 44 Mo. 290 it was held that where land belonging to a wife is occupied by her and her husband as a home, the husband and not the wife is the proper party to bring an action for damages for a nuisance which does no permanent injury to the freehold.

[52]*Hosmer* v. *Republic Iron and Steel Co.* (1913) 179 Ala. 415, 60 So. 801 (noxious vapors caused death of young child who lived with his father.) And see *Fort Worth etc. R. R.* v. *Glenn* (1904) 97 Tex. 586, 80 S. W. 992 (an old well caused serious illness of young child who lived with his father). See also 13 Col. Law Rev. 433: "While this view presents somewhat of an extention of the strict common law conception of a nuisance, such an expansion in order to give a remedy to an infant, living with the parent on the latter's premises, seems thoroughly justifiable; for there appears to be no occasion for compelling an infant to leave his father's home to avoid the consequences of another's unlawful act, which is really an injury to the occupancy of the land."

[53]*Griffith* v. *Lewis* (1885) 17 Mo. App. 605, 612 (liability for percola-

Motive of defendant—"spite fences"—percolating waters. Since an easement of light and air may be acquired by prescription in England and the only way of preventing its being thus acquired is by erecting a structure which will shut off the light and air, the erection of any structure for this purpose is permissible; the motive for such an erection can be no bar because it is a beneficial use of the property to prevent the acquisition of an easement over it.[54]

In the United States an easement of light and air can not be acquired by prescription; but on the question of the validity of a structure which is of no beneficial use to the one erecting it, but has been erected from motives of spite, revenge, intimidation, etc., there is a conflict of authority.[55] In some jurisdictions

tion of water from privy vault causing injury to health does not arise till after notice and a reasonable time to repair). *Ellis* v. *Kansas City etc. R. R.* (1876) 63 Mo. 131 (wife of lessee of premises made ill by nuisance); *Holley* v. *Boston Gas Light Co.* (1857) 8 Gray (Mass.) 123. (nine-year-old child injured by escape of gas). This view seems to be more nearly in accord with the historical development of the law of torts; see 26 Harv. Law Rev. 760.

[54]See *Chandler* v. *Thompson* (1811) 3 Campb. 80.

[55]For a collection of cases on each side, see *Letts* v. *Kessler* (1896) 54 O. St. 73, 42 N. E. 765: In that case the plaintiff alleged that the defendant was erecting a high board fence on his ground which would obstruct the windows of her hotel and deprive her of light and air, and that the fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone. Relief was refused. "As long as he keeps on his own property and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so would not be enforcing a rule of property but a rule of morals." But the better view and probably the weight of authority in this country is that one has no absolute right to erect useless structures on his land for the sole purpose of injuring others. *Burke* v. *Smith* (1888) 69 Mich. 380, 37 N. W. 838: "The right to breathe the air and enjoy the sunshine is a natural one; and no man can pollute the atmosphere or shut out the light of heaven for no better reason than that the situation of his property is

statutes have been passed making unlawful the building of such structures beyond a certain height,[56] and such statutes have been held constitutional.[57] If such structures are held unlawful either with or without a statute, equity will usually enjoin their erection or decree their removal, just as in other cases of private nuisance.

A similar situation exists as to malicious interference with percolating waters. English courts deny relief on the ground that a landowner has an absolute right to the percolating waters which he can intercept in his land and is not liable to an adjoining proprietor, regardless of the quantity of water taken, or the purpose to which it is applied.[58] In this country, by the weight of authority, relief is given against such malicious interference upon the same principles that underlie the spite fence cases.[59]

Joint actors—independent actors. Where a nuisance is caused by several persons intentionally co-operating, each is liable for all the damage done and they may be sued separately or together either at law or in equity. Where, however, the nuisance is caused by several persons acting independently of each other, each is liable at law only for his share of the damage,[60] and appar-

such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor." See also 12 Col. Law Rev. 633-635; 25 Harv. Law Rev. 197. Even tho the structure has been erected from spite it is not considered unlawful if it serves a useful purpose. *Kusniak* v. *Kosminski* (1895) 107 Mich. 444, 65 N. W. 275 (building used as a woodshed).

[56]In Massachusetts, chapter 348 of statutes of 1887: "Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

[57]*Rideout* v. *Knox* (1889) 148 Mass. 368, 19 N. E. 390.

[58]*Acton v. Blundall* (1843) 7 M. & W. 324; 9 Col. Law Rev. 543.

[59]*Chesley* v. *King* (1882) 74 Me. 164. See *contra, Ellis* v. *Duncan* (1855) 21 Barb (N. Y.) 230; 9 Col. Law Rev. 543, 12 *id.* 633, 634.

[60]*Watson* v. *Colusa-Parrott Co.* (1904) 31 Mont. 513, 79 Pac. 14, defendant's smelting plant along with those of several others polluted the water and thus injured the plaintiff, a lower riparian proprietor. As the

ently each should be sued separately.[61] And this liability exists, even tho the separate act of each one did not amount to a nuisance;[62] in this latter situation, however, it has been held that the actors must be sued jointly and not separately.[63]

In any case where the defendants are liable to be sued jointly at law, there is, of course, no difficulty about joining them in a suit for an injunction.[64] If they are liable only to separate suits at law, they are subject to separate suits in equity;[65] but apparently the plaintiff may, if he prefers, join the independent actors in one suit, jurisdiction being usually placed upon the ground of avoiding a multiplicity of suits.[66]

court pointed out, the difficulty of apportionment was no defense whatever to an action at law.

[61]*Watson* v. *Colusa Parrott Co., supra. Martinowsky* v. *City of Hannibal* (1889) 35 Mo. App. 70, 77.

[62]*Thorpe* v. *Brumfitt* (1873) 8 Ch. App. 650: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, tho the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on the way; that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he did causes of itself no damage to the complainant." See also *Lambton* v. *Mellish* (1894) 3 Ch. 163; 4 Col. Law Rev. 367.

[63]*Hillman* v. *Newington* (1880) 57 Cal. 56, diversion of water by several upper proprietors so that the aggregate diversion caused a nuisance.

[64]*Hillman* v. *Newington, supra.*

[65]*Lambton* v. *Mellish, supra.* The English practice seems to be to bring separate suits and have them tried together. See 7 Col. Law Rev. 57, 59.

[66]See *Warren* v. *Parkhurst* (1906) 186 N. Y. 45, 78 N. E. 579: 7 Col. Law Rev. 57.

Whether issue at law must first be directed. The early rule was that before a plaintiff could get a perpetual injunction against a trespass he must first establish his right at law if there was a dispute in regard to it.[67] This rule was later abolished in England and modified in this country; but it apparently has not disappeared tho the reasons for its existence no longer prevail.[68]

[67]Logically one would expect that courts of equity would give a remedy in all cases where the common law remedy is not adequate, just as in cases of waste; but the early rule was that if the defendant disputed the plaintiff's title or in any other way claimed a right to do the act threatened, the mere fact that there was a dispute precluded equitable relief. In *Pillsworth* v. *Hopton* (1801) 6 Ves. 51 Lord Eldon said: "I remember perfectly being told from the bench very early in my life that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." At that time there were two fairly adequate reasons for the rule. One was that the method of trial by deposition in equity courts was not as satisfactory for dealing with complicated questions of property or torts as a trial in open court which is the normal method under the common law. This has disappeared practically everywhere, equity suits being tried in much the same way as common law actions are tried, the equity judge even considering himself bound by common law rules of evidence tho their existence is to be justified almost entirely by the method of trial by jury. The other was that at that time in England the Chancery court sat only at Westminster while common law courts sat in various parts of the country; hence after the method of trial had been changed and witnesses were examined in open court it would cause a great expense to have them all come to London. At the present time, in probably every Anglo-American jurisdiction, courts of equity are as accessible to suitors as are common law courts.

[68]With the disappearance of the reasons for the rule, the rule itself should have disappeared because it was not a limit upon the existence of equity jurisdiction but merely upon its exercise as a matter of convenience and expediency. But the reasons for the rule were not well understood and hence the rule in modified form still persists in probably the large majority of jurisdictions. As modified the rule is substantially as follows: If there is a *bona fide* and reasonable dispute as to title, equity will give a temporary injunction to preserve the *status quo* till the legal right can be settled at law; if the defendant is in possession the burden will be upon the plaintiff to establish his title by bringing ejectment and

The early rule[69] requiring that in suits to enjoin a nuisance an issue be first directed to try the question whether the nuisance alleged was in fact[70] such, has had much the same development.[71]

it will be necessary for him to make out a more serious case for equitable relief than if the defendant were not in possession. If the plaintiff is in possession and the defendant has actually committed a trespass the burden will be upon the plaintiff to test his legal right by an action of trespass *quare clausum,* but if the defendant has merely threatened a trespass the burden will be upon the defendant to bring ejectment. If the holder of a particular estate is in possession the plaintiff cannot, of course, bring trespass; but he can bring an action on the case if he can show an injury to his reversionary interest; if there is an injury to his reversionary interest the burden will be upon him to establish his title by bringing such an action on the case; if there is no injury to his reversionary interest and none is threatened, he does not need an injunction.

[69]*Weller* v. *Smeaton* (1784) 1 Brown Ch. 572. 1 Ames Eq. Cas. 554; *Elmhurst* v. *Spencer* (1849) 2 MacN. & G. 45. But see *Bush* v. *Western* (1720) Precedents in Ch. 530, 1 Ames Eq. Cas. 553. *Arnold* v. *Klepper* (1857) 24 Mo. 273. 277. In *Welton* v. *Martin* (1842) 7 Mo. 307, 311 the court gave as one reason for refusing relief that the plaintiff had not established his right at law (obstruction of private water course). See also *Baker* v. *McDaniel* (1903) 178 Mo. 447, 468, 77 S. W. 531.

[70]Since in the narrow sense a nuisance does not involve any violation of the plaintiff's possession, questions of the plaintiff's title are not raised; in this respect a suit to restrain a nuisance resembles a suit to stay waste rather than a suit to enjoin a trespass; hence as a matter of logic one might have expected that there would be no requirement of directing an issue at law in suits to enjoin a nuisance just as there is no such requirement in suits to stay waste. But the jurisdiction of equity over nuisance is of a later development than that over waste and in the meantime the rule in trespass cases had grown up; and since nuisance is superficially more like trespass than waste it is not surprising that the trespass rule should be adopted. See 22 Harv. Law Rep. 65, reviewing 56 U. of Pa. Law Rev. 290-315: "Injunctions against Nuisances and Rule Requiring the Plaintiff to Establish his Right at Law." See the odd remark in *Carpenter* v. *Grisham* (1875) 59 Mo. 247, 250, that the requirement is more particularly applicable to nuisance than to trespass.

[71]At the present time the rule does not apply where the alleged nuisance is clearly shown; *Turner* v. *Mirfield* (1865) 34 Beav. 390, 1 Ames Eq. Cas. 409. Where the court does direct an issue, it will usually give

Unless the rule has been definitely repudiated by judicial decision, it should be abrogated by statute.[72]

Balance of convenience—preliminary injunctions. Where a preliminary injunction is sought against a nuisance it is well settled that in deciding whether or not to give it the court will balance the inconvenience to the defendant if relief should be given against the inconvenience to the plaintiff if relief should be denied. As was observed in *Crowder* v. *Tinkler,*[73] "great caution is required in granting an injunction of this nature where the effect will be to stop a large concern in a lucrative trade."[74]

a temporary injunction to maintain the status quo till the issue is decided: *Pollock* v. *Lester* (1853) 11 Hare 266; *Longwood Valley R. R.* v. *Baker* (1876) 27 N. J. Eq. 166. In *Soltau* v. *De Held* (1851) 2 Simon (N. S.) 133 it was held that the defendant is not entitled to have an issue directed more than once; he cannot, by reducing the amount of noise (bell ringing) entitle himself to insist upon having a jury determine whether the ringing bell is now a nuisance. *Hayden* v. *Tucker* (1860) 37 Mo. 214, 222 (only necessary where a question of title involved or the right itself is doubtful or uncertain; a purchaser of land is entitled to an injunction tho the nuisance was in existence before he purchased); *Harrelson* v. *R. R.* (1899) 151 Mo. 482, 500, 52 S. W. 368; "In a clear case a court of equity will grant relief without waiting for the slow process of law." In *McNulty* v. *Miller* (1912) 167 Mo. App. 134, 151 S. W. 208 relief was given tho there had been no trial at law. In *Atterbury* v. *West* (1909) 139 Mo. App. 180, 186, 122 S. W. 1106; "Since the decision in that case (*Paddock* v. *Somes* (1890) 102 Mo. 226, 240, 14 S. W. 746) the courts are holding that it is not necessary to first establish the fact of the existence of the nuisance by the court of law, etc." In *Getz* v. *Amsden* (1907) 125 Mo. App. 592, 596, 102 S. W. 1037, "his right must be clear and the injury established, as in doubtful cases the party will be turned over to his legal remedy." But see *Shelton* v. *Cummins* (1916) 189 S. W. 1190.

[72]See 56 U. of Pa. Law Rev. 290, 315.

[73](1816) 19 Ves. 617, 1 Ames Eq. Cas. 555 (suit to prevent the defendants from using a new building as a powder magazine).

[74]In *Eaden* v. *Firth* (1803) 1 H. & M. 573, 1 Ames Eq. Cas. 564, the court refused a preliminary injunction against the operation of a large steam hammer: "The question is, whether the balance of convenience is in favor of or against the issue of an interlocutory injunction. If I found any real apprehension of serious and immediate injury to health

And where the decree sought is affirmative rather than negative it is usually considered that still more caution should be used. In *Herbert* v. *Penn. R. R. Co.*[75] the defendant railroad had made such a large embankment on its own land as to cause irregular upheavals of the plaintiff's adjacent lot. The court refused a preliminary affirmative degree: "A mandatory injunction should be issued interlocutorily with hesitation and caution, and only in an extreme case where the law plainly does not afford an adequate remedy. It does not with certainty appear that further injury will result to the complainant from the embankment or the further filling upon it. . . . In such a condition . . . the court should not, by its mandatory injunction compel the defendant to expend thousands of dollars in destroying that which it has expended so much in building up, and under such circumstances the court should not, by its preventive injunction, stop the completion of a work upon which so much has been expended and which will be of as great public benefit as it appears this will be."[76]

Same—existence of nuisance. Unless the plaintiff is complaining of an interference with what the law regards as a technical property right,[77] it is necessary to show substantial damage

or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the mean time; but in this case I see nothing except annoyance apprehended by the plaintiff; and I certainly think that on the question of balance of convenience I ought to refuse the injunction." See also *Maloney* v. *Katzenstein* (1909) 120 N. Y. Supp. 418 where such relief was refused because of the hardship it would cause defendant who had without objection carried on the alleged offensive business for nineteen years.

[75](1887) 43 N. J. Eq. 21, 10 Atl. 872.

[76]See also *Robinson* v. *Byron* (1785) 1 Brown, Chanc. Cases, 588; *Longwood Valley R. R.* v. *Baker* (1876) 27 N. J .Eq. 166. In *Hepburn* v. *Lordan* (1865) 2 H. & M. 345 the defendant was compelled at once to remove some damp jute because of the slight cost of such removal compared with the enormous damage which the plaintiffs would suffer if a fire should be caused by its spontaneous combustion.

[77]See *ante* p. 11.

in order to prove a nuisance;[78] and unless the damage consists of a direct injury to property,[79] the question of the existence of a nuisance involves a consideration of the relative convenience of the plaintiff, the defendant and the public. The question has usually been raised in cases where the plaintiff has chosen to live in a community devoted largely to industry. In *Gilbert* v. *Showerman*[80] the plaintiff sought to enjoin the running of a flour mill near the building in which he lived. In denying an injunction Cooley, J. said: "The right to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare.[81] . . . The defendants are carrying on a business

[78]See *ante* p. 9.

[79]*St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642: "It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurred. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. . . . But when an occupation, or business is a material injury to property then there unquestionably arises a very different consideration." It must be confessed that it is not always easy to draw the distinction which the learned judge insists upon; see 7 Col. Law Rev. 550.

[80](1871) 28 Mich. 448.

[81]*Rushman* v. *Polsue and Alfieri* (1906) 1 Ch. 234: "The views that the standard of what amount of freedom from smoke, smell and noise a man may reasonably expect will vary with the locality in which he dwells seems to be confirmed by the following passage in Lord Hals-

not calculated to be especially annoying, except to occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. . . . The complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner."[82]

bury's judgment in *Colls* v. *Home & Colonial Stores* (1904) A. C. 179: "A dweller in town cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give cause for action, but in each of such cases it becomes a question of degree and the question is in each case whether it amounts to a nuisance which will give a right of action." See 19 Harv. Law Rev. 474; 6 Col. Law Rev. 458. See *Bradbury Marble Co.* v. *Laclede Gaslight Co.* (1907) 128 Mo. App. 46, 107, 106 S. W. 594; *Gibson* v. *Donk* (1879) 7 Mo. App. 37, 40; *Morie* v. *St. Louis Transit Co.* (1905) 116 Mo. App. 12, 27, 91 S. W. 962.

[82]A plaintiff who is compelled, because of comparative poverty, to live outside the purely residential districts, is not, however, deprived of all protection. In *Ross* v. *Butler* (1868) 19 N. J. Eq. 294 the plaintiff sought to enjoin the erection of a pottery to burn earthenware because it would produce a large amount of smoke and cinders; one defense was that the locality was occupied principally by mechanics and laborers who used their houses and lots for business purposes. In giving relief: "I find no authority that will warrant the position that a part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells and smoke, cinders, or intolerable noises, even if the inhabitants themselves are artisans, who work at trades occasioning some

Same—adequacy of damages. Even tho the act complained of amounts to a nuisance so that damages are recoverable at law, an injunction is occasionally refused as a matter of discretion, taking into consideration the relative inconvenience suffered by giving or denying relief. In *Swaine* v. *Great Northern Ry. Co.*[83] the plaintiff asked an injunction against the defendant's leaving manure in stacks or in cars on their sidetrack close to the plaintiff's house. In remitting the plaintiff to his remedy at law: "It is not every case that the court will interfere by injunction. . . . . Occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases; there is not . . . here a sufficient case for such interference."[84]

Same—perpetual injunction. Where the act complained of is proved or admitted to be a nuisance and where furthermore, damages therefor are conceded to be inadequate, it would seem to follow logically that the plaintiff is entitled to a perpetual injunction as of right, regardless of any further question of balancing conveniences. This is probably the prevailing rule.[85] But

degree of noise, smoke and cinders. . . . There is no principle . . . . which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

[83](1864) 4 DeG., J. & S., 1 Ames Eq. Cas. 569.

[84]See also *Cook* v. *Forbes* (1869) 5 Eq. Cas. 166; *Giotlich* v. *Klein & Cohn* (1909) 32 O. Cir. Ct. 665 (injunction refused against the operation of hammers and heavy machinery). In *Robinson* v. *Baugh* (1875) 31 Mich., 290, the fact that the defendant's blacksmith shop was on leased ground under a short term and the machinery was easily removable made it easier for the court to give equitable relief. *Foundry* v. *R. R.* (1908) 130 Mo. App. 104, 116, 109 S. W. 80; *Victor Mining Co.* v. *Morning Star Mining Co.* (1892) 50 Mo. App. 525, 534 (removal of lateral support; injunction refused); *Schopp* v. *Schopp* (1911) 162 Mo. App. 558, 565, 142 S. W. 740.

[85]*Broadbent* v. *Imperial Gas Co.* (1856) 7 DeG., M. & G. 436, 462: "The present is not a case in which this court can go into the question of convenience and inconvenience, and say where a party is substantially damag-

in some jurisdictions courts have refused injunctions in such cases because of the comparatively great hardship on the defendant if an injunction were granted, especially if there would also result hardship to the public. In *Richards' Appeal*[86] the plaintiff sought to enjoin the defendant from using soft coal in their puddling furnaces because the smoke discolored the plaintiff's fabrics in his cotton factory, and rendered his residence uncomfortable. The defendant's works had cost over half a million dollars, nearly a thousand persons were employed; it was practically impossible to run their furnaces without soft coal and no way had yet been found of avoiding the escape of smoke. The court denied the relief sought: "Especially should the injunction be refused if it be very certain that a greater injury would ensue by enjoining than would by a refusal to enjoin. . . . Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury."[87]

ed, that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of law; and I quite agree with the Vice-Chancellor, in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." See also *Hennesy* v. *Carmony* (1892) 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames Eq. Cas. 578; *Whalen* v. *Union Bag & Paper Co.*, (1913) 208 N. Y. 1, 101 N. E. 805; 13 Col. Law Rev. 635; 14 Harv. Law Rev. 149; 22 *Id.* 458; 18 *Id.* 596, 613; 25 *Id.* 474.

[86](1868) 57 Pa. 105, 1 Ames Eq. Cas. 574.

[87]In *Daniels* v. *Keokuk Water Works* (1883) 61 Ia. 549, 16 N. W. 706, 1 Ames Eq. Cas. 585, emphasis was laid upon the public inconvenience which would result from an injunction. For other cases denying an injunction because of the "balance of convenience" doctrine, see 14 Harv. Law Rev. 458, 623, 22 *Id.* 596, 613, criticising *Bliss* v. *Anaconda Mining Co.* (1908) 167 Fed. 342; 22 Harv. Law Rev. 61, criticising *Somerset Water etc. Co.* v. *Hyde* (1908) 129 Ky. 402, 111 S. W. 1105; 57 U. of Pa. Law Rev. 396, criticising *McCarthy* v. *Bunker Hill etc Co.* (1908) 164 Fed. 927. In *City of Wheeling* v. *Natural Gas Co.*, (1914) 74 W. Va. 372, 81 S. E. 1067 the court refused to enjoin a gas company from

The criticism of the prevailing view is that it allows the plaintiff to charge the defendant an exhorbitant price for his property.[88] Unless, however, the plaintiff has bought the property with that as his sole motive, this is considered as one of the legitimate incidents of ownership.[89] And the defendant can usually protect himself at the outset by buying up sufficient land to prevent the question from being raised.[90] The result of the minority holding is that the plaintiff is remitted to his legal remedy; if he recovers only for damages down to the date of bringing his action, he will be compelled to sue just before the close of each statutory period[91] in order to prevent the acquisition of an easement; if he recovers prospective damages, the defendant acquires by the judgment against him such an easement at once. This in substance allows the defendant to take the plaintiff's

supplying gas in violation of its franchise because of the inconvenience it would cause the public. 28 Harv. Law Rev. 110. And the doctrine has occasionally been applied in trespass cases; 28 Harv. Law Rev. 209.

[88]See 22 Harv. Law Rev. 596, 597.

[89]In *Edwards* v. *Allouez Mining Co.* (1878) 38 Mich. 46, 1 Ames Eq. Cas. 608, the defendants in 1874 had erected a copper stamp mill at a cost of $60,000. As a result of its operations, large quantities of sand were carried down stream and deposited on bottom lands below; it was impossible to run at a profit unless they were allowed to do this. In 1875 the plaintiff bought the land below, not for use but as a matter of speculation expecting to compel the defendants to pay a large price; for this reason an injunction was refused, and the plaintiff remitted to his rights at law. But see *Cowper* v. *Laidler* (1903) 2 Ch. 337, where the plaintiff's motive in purchasing was held no bar in case of disturbance of an easement of light and air.

[90]See 14 Harv. Law Rev. 458, 459.

[91]In *Attorney General* v. *Council and Borough of Birmingham* (1858) 4 K. & J. 528, 540, the court seemed to think that a plaintiff "would be obliged to bring a series of actions one every day of his life." There seems to be no sound basis for such a suggestion. *Hayden* v. *Tucker* (1866) 37 Mo. 214, 224: "Why compel the party to commence a fresh action every day to establish each separate act of nuisance, when the whole can be finally concluded and set at rest by the chancellor, etc."

property by a sort of private eminent domain;[92] and while it can not be plausibly argued that the refusal of a court of equity to grant an injunction is a violation of the fifth and fourteenth amendments to the United States Constitution which impliedly prohibit either the Federal or the State government from the taking of private property for private use even with compensation,[93] it is inconsistent with the spirit of these amendments[94] unless the public interest in the defendant's enterprise is so great as to make it in substance a taking for a public use.[95]

[92]See 25 Harv. Law Rev. 474.

[93]*Quaere* as to whether legislation, which gives equity courts power to award damages in lieu of an injunction in order to avoid the necessity of the plaintiff's suing at law, is a violation of the letter of the amendments. See *Hennesy* v. *Carmony* (1892) 50 N. J. Eq. 616, 1 Ames Eq. Cas. 578: "And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of Parliament for the purpose, called Lord Cairns and Sir John Rolt's acts. The giving of damages for continuing nuisances is quite within the omnipotent power of Parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, that course is forbidden."

[94]See 13 Col. Law Rev. 635, 636: "The result of the denial of an injunction in such cases is the same whether the plaintiff is driven to pursue his remedy at law, or whether the legislature vests in the courts the power to exercise discretion in awarding damages instead of an injunction. It results in a forced sale of individual rights at private valuation."

[95]It has been suggested that if there is such a great public interest the proper course is to require the defendant to make the proper constitutional condemnation. See 12 Col. Law Rev. 635, 637; 57 U. of Pa. Law Rev. 396, 398; 22 Harv. Law Rev. 596, 597. But under the rather restricted notion of what constitutes a public purpose under the amendments, it is not clear that a legislature may authorize large private industrial plants to take property by eminent domain. The best solution to the whole difficulty would be to liberalize and broaden our definition of public purpose so that the legislature may authorize such proceedings. This would approximate the situation in this country to that in England where Parliament may even authorize the taking of private property for a purely private use.

II DISTURBANCE OF PRIVATE EASEMENTS.

Private easements distinguished from natural rights—remedies. A private easement has been defined[96] as "a right in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit." Easements differ from natural rights in that they are created separately[97] as distinct subjects of property, while natural rights are mere incidents to the ownership of land. For a disturbance or interference with the proper exercise of an easement,[98] either by the owner of the servient tenement or by a third person, the common law remedy[99] is an action on the case[100] for damages. Where this is not adequate equity grants relief by either a negative or affirmative decree.

In most of the cases[101] in which equitable relief has been

[96]Tiffany, Real Property sec. 304.

[97]Either by voluntary act of the parties or by prescription.

[98]The disturbance of a private easement is frequently referred to as a private nuisance; see 9 Ill. Law Rev. 278-281; *Morgan* v. *Boyes* (1875) 65 Me. 124.

[99]The common law also allowed the aggrieved person to abate the obstruction; *Sargent* v. *Hubbard* (1869) 102 Mass. 380 (cutting branch that obstructed private way); but unnecessary damages must be avoided; *Joyce* v. *Conlin* (1888) 72 Wis. 607, 40 N. W. 212.

[100]Trespass does not lie because the occupier of the dominant tenement was not considered as being *possessed* of the easements.

[101]Tiffany, Real Property sec. 304 names the following easements as most important: "Rights in extension or diminution of natural rights in regard to air, water, and support; rights of way over another's land; rights as to the use of a party wall in part or wholly on another's land; rights to have light and air pass to one's windows without obstruction; pew rights in churches and burial rights in cemeteries." Equity will also enjoin the wrongful interference with a profit or similar right; *State ex rel.* v. *Goodrich* (1911) 238 Mo. 720, 142 S. W. 300 (contractual right to cut and remove timber from land). See also *Harber* v. *Evans* (1890) 101 Mo. 661, 668, 14 S. W. 750 (defendant restrained from putting windows in party wall though plaintiff did not intend to use wall.)

granted the easement disturbed has been either one of light and air, right of way or right of access to a public way.

Light and air. The mere fact that an action at law will lie for interference with an easement of light and air[102] is not a suffcient reason for an injunction.[103] On the other hand, the fact that the obstruction does not interfere with the plaintiff's present use of the premises for which strong light is not required is no defense to a suit for an injunction if the threatened obstruction would substantially interfere with any lawful business.[104] Nor is it material that the plaintiff bought the property as an investment without intending to occupy it himself.[105] But if the obstruction is temporary and easily removable, and the premises are occupied by tenants, the landlord may fail to get an injunction because there is no damage to his interest in the land, tho the tenants themselves would have been entitled to equitable relief.[106]

[102]Easements of light and air are quite common in England because they can there be acquired by prescription. This part of the English common law was rejected in America as inapplicable to a new country, and easements of light and air by grant are comparatively rare.

[103]*Attorney General* v. *Nichol* (1809) 16 Vesey 338, 1 Ames Eq. Cas. 534 (affidavit did not state the amount which the plaintiff's windows would be darkened by the obstruction).. See also *Jackson* v. *Duke of Newcastle* (1864) 3 DeG. J. & S., 275. In *Martin* v. *Price* (1893) 1 Ch. 276, 1 Ames Eq. Cas. 537 the defendant had pulled down a house and was in the process of erecting a new building some twenty-five feet higher. Since this would cause the plaintiff substantial deprivation of light he was given an injunction. In *Home & Colonial Stores L't'd.* v. *Colls* (1902) 1 Ch. D. 302 the "true rule of law" was stated to be: "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." An injunction was given in *St. Louis etc. Co.* v. *Kennet's Est.* (1903) 101 Mo. App. 370, 397, 74 S. W. 474 (smoke stack and oriel windows).

[104]*Yates* v. *Jack* (1866) 1 Ch. App. 295, 1 Ames Eq. Cas. 541, *semble.* See 4 Harv. Law Rev. 193.

[105]*Wilson* v. *Townsend* (1860) 1 Drewry & Smale 324, 1 Ames Eq. Cas. 539.

[106]*Jones* v. *Chappell* (1875) 20 Eq. Cas. 539. The rule is similar in case of private nuisance; *Simpson* v. *Savage* (1856) 1 C. B. (N. S.) 347.

There is, of course, more reluctance in granting affirmative than in granting negative decrees; but affirmative relief has been frequently granted not only on the final decree[107] but also on motion.[108] If after notice that an injunction will be sought the defendant has continued erecting the obstruction, such continuance will not place him in any better situation with respect to equitable relief.[109]

Right of way. One who has a private right of way is enttled to equitable relief against either an actual[110] or threatened

[107]*Smith* v. *Smith* (1875) 20 Eq. Cas. 500, 1 Ames Eq. Cas. 543 (defendant had torn down an old wall nine feet high and erected a new one twenty-six feet high.) In *Calcraft* v. *Thompson* (1867) 15 Weekly Rep. 387 affirmative relief was refused because the plaintiff had failed to show that there would be a substantial deprivation of light. In *Brande* v. *Grace* (1891) 154 Mass. 210, 31 N. E. 633, the plaintiffs had sought to enjoin their lessor from building another room in front of the room leased and occupied by the plaintiffs as a dental office; the appeal court held that the lower court should have given the injunction but that since the work had been completed and the plaintiffs' lease would soon expire, their remedy should now be confined to damages.

[108]*Ryder* v. *Bentham* (1750) 1 Ves. Sr. 543, 1 Ames Eq. Cas. 545 (scaffold ordered removed.)

[109]*Smith* v. *Day* (1880) 13 Ch. D. 651; *VanJoel* v. *Hornsey* (1895) 2 Ch. 774, 1 Ames Eq. Cas. 546: "The court will not allow itself to be imposed upon by a proceeding of that kind." See also *Daniel* v. *Ferguson* (1891) 2 Ch. 27.

[110]*Stallard* v. *Cushing* (1888) 76 Cal. 472, 18 Pac. 427 (stairway placed by defendant in plaintiff's private alley;) *Shivers* v. *Shivers* (1880) 32 N. J. Eq. 578 (gate placed by defendant across plaintiff's right of way obtained by prescription). Most of the cases are of affirmative decrees against actual obstructions. In jurisdictions which reject the doctrine of balance of convenience the plaintiff is entitled to an affirmative decree even tho it will cause great expense to the defendant; *Krehl* v. *Burrell* (1878) 7 Ch. D. 551 (court ordered removal of large building obstructing passage way to the back of plaintiff's house). Continuing to build after notice of the plaintiff's claim does not place the defendant in any better situation with reference to equitable relief against him. *Tucker* v. *Howard* (1880) 129 Mass. 361, 1 Ames. Eq. Cas. 548. *Swisher* v. *C. & A. R. R.* 235 Mo. 420, 441 (plaintiff had a right of way ten feet wide and defendant had obstructed it so as to make it only six feet ten inches wide); *Sultzman* v. *Branham* (1907) 128 Mo. App. 696, 701, 108

interference therewith; and where the circumstances of the case require it, an affirmative decree will be given on motion.[111]

Where the obstruction has been caused independently by several defendants the plaintiff is entitled to a decree against all even tho the share contributed by any one would not have been enough by itself to warrant either an action at law or an equitable decree.[112].

In some jurisdictions if the defendant disputes the plaintiff's right and raises thereby a reasonable doubt, an issue at law will first be directed to determine the existence of the easement unless there is danger of serious injury.[113] As already explained, the real reasons for such a requirement have disappeared and the requirement itself should be abolished.[114]

A reversioner is entitled to equitable relief where the ob-

S. W. 1074 (threatened obstruction of passage way). In *Brier* v. *Bank* (1909) 225 Mo. 673, 683, 125 S. W. 469 the court refused to order the removal of the obstruction to the plaintiff's stairway because "there is no averment that any future injury is anticipated or threatened." The mere fact that the obstruction is already completed does not, however, prevent its causing injury in the future.

If the plaintiff fails to prove the existence of an easement, he will of course, fail; *Peters* v. *Worth* (1901) 164 Mo. 431, 439, 64 S. W. 490; *Lentz* v. *Johnson* (1911) 157 Mo. App. 483, 137 S. W. 1002.

Conversely, the owner of the servient tenement may enjoin an unauthorized excessive use of the right of way; *Bruner Granitoid Co.* v. *Glencoe etc. Co.* (1912) 169 Mo. App. 295, 300, 152 S. W. 601. But a licensee has no such interest in the land as will entitle him to equitable relief; *Cook* v. *Ferbert* (1898) 145 Mo. 462, 465, 46 S. W. 947.

[111]*Hodge* v. *Giese* (1887) 43 N. J. Eq. 342, 11 Atl. 484 (decree required defendant to allow the plaintiff to pass through the defendant's barber shop to the furnace which supplied heat to the plaintiff's rooms on the two floors above.)

[112]*Thorpe* v. *Brumfitt* (1873) 8 Ch. App. 650, 1 Ames. Eq. Cas. 547 (plaintiff's right of way to his inn obstructed by horses and wagons belonging to several defendants).

[113]*Hart* v. *Leonard* (1880) 42 N. J. Eq. 416, 1 Ames Eq. Cas. 549. See also 10 Col. Law Rev. 355.

[114]See ante pp. 20-22.

struction causes a substantial injury to the reversioner's interest in the land.[115]

Land occupier's right of access to public way. If the owner of land adjoining a public way owns to the middle of the way, one in possession of the land may maintain an action of trespass against the use of that part of the way in a manner not authorized by the public easement, and if trespass is not an adequate remedy, he may get relief in equity.[116] But if the fee of the way is in the municipality, the adjoining land occupier has only an easement of access to the way. If this easement is obstructed he is entitled to damages in an action on the case and if damages are not adequate, he is entitled to equitable relief. In *West* v. *Brown*[117] the defendant had been allowing his hacks to stand for an unreasonable length of time in front of the plaintiff's

[115]*Webb* v. *Jones* (1909) 163 Ala. 637, 50 So. 887; 10 Col. Law Rev. 355, 364 (right of way to plaintiff's farm obstructed by wire fence; the farm was rented to a tenant but the plaintiff's free access to the farm was interfered with and the market value of the property diminished thereby).

[116]In *American Manufacturing Co.* v. *Lindgren* (1912) 48 N. Y. L. J. 19 the defendant had been making speeches in front of the plaintiff's factory, vilifying the owners and urging the workers to strike. The plaintiff could have brought trespass because they owned the fee of the street but such a remedy would have been obviously inadequate and therefore it was held proper to issue an injunction.

[117](1897) 114 Ala. 118, 21 So. Rep. 452, 11 Harv. Law Rev. 130. See also *Ackerman* v. *True* (1902) 71 App. Div. 413, where the defendant was compelled to remove some houses which so projected into the street as to interfere with plaintiff's access to an adjoining lot. 2 Col. Law Rev. 559. There is a tendency to confuse this right of access with the rather similar right of individuals to get relief against the obstruction of a public easement. In *Callahan* v. *Gilman* (1887) 107 N. Y. 310, 14 N. E. 264, the defendant had so obstructed the sidewalk in front of the plaintiff's store as to interfere with the plaintiff's trade. In very properly giving relief the court speaks of the defendant's act as a public nuisance tho obviously the plaintiff's injury is due to blocking his right of egress and ingress to his store. See also 28 Harv. Law Rev. 499, 500, 6 Col. Law Rev. 203. *Downing* v. *Dinwiddie* (1895) 132 Mo. 92, 100, 33 S. W. 470, 575; *Corby* v. *C. R. I. & P. R R.* (1899) 150 Mo. 457, 468, 52 S. W. 282.

hotel, thus obstructing the right of access of the plaintiff and his guests, to the injury of the plaintiff's business. Damages being obviously inadequate,[118] the plaintiff was given a decree.[119]

[118]In *Herbert* v. *Pennsylvania R. R. Co.* (1887) 43 N. J. Eq. 21, 10 Atl. 872, the defendant had made a large embankment on its own land which caused irregular upheavals of the plaintiff's nearby lot and obstructed access. Tho damages were not adequate, relief was denied on the ground that the balance of convenience was against it.

[119]Apparently the land occupier not only has a right of access to the adjacent street but also has a right to an unobstructed view of the street. *Cobb* v. *Saxby* (1914) 3 K. B. 822 (defendant's sign board projected over the street in such a manner as to obscure the view from the plaintiff's side wall, which he used for advertising). In 28 Harv. Law Rev. 499 it is suggested that such a right might be called the right of publicity and that it is more analogous to an easement of light and air than to an easement of access because only a substantial obstruction of the view should be actionable. *Lakeman* v. *R. R.* (1889) 36 Mo. App. 363, 373; *Downing* v. *Corcoran* (1905) 112 Mo. App. 645, 649, 87 S. W. 114; *Lockwood* v. *Wabash Ry.* (1894) 122 Mo. 86, 100, 26 S. W. 698 (railroad in street); *Corby* v. *C. R. I. & P. R. R.* (1899) 150 Mo. 457, 468, 52 S. W. 282 (railroad in alley); *Zimmerman* v. *Ry. Co.* (1910) 154 Mo. App. 296, 302, 134 S. W. 40; *Watson* v. *Ry. Co.* (1897) 69 Mo. App. 548, 552 (right to exclusive temporary use of the whole or part of adjacent street for reasonable space of time for receiving and discharging freight necessary to his business); *Sheedy* v. *Union Brick Works* (1887) 25 Mo. App. 527, 539 (action for damages); *Martin* v. *R. R.* (1891) 44 Mo. App. 452, 457 (action for damages); *Wallace* v. *R. R.* (1891) 47 Mo. App. 491, 498 (action for damages); *Rabich* v. *Stone* (1909) 137 Mo. App. 318, 321, 117 S. W. 1195 (affirmative relief given); *Downing* v. *Dinwiddie* (1895) 132 Mo. 92, 100, 33 S. W. 1130; *Hulett* v. *Ry.* (1899) 80 Mo. App. 87, 91; *Weller* v. *Lumber Co.* (1913) 176 Mo. App. 243, 253, 161 S. W. 853 (access to navigable stream); *In re Heffron* (1913) 179 Mo. App. 639, 655, 162 S. W. 652 (sidewalk obstructed by strikers); *Schopp* v. *City of St. Louis* (1893) 117 Mo. 131, 137, 22 S. W. 898 (injunction given against city leasing stands in front of plaintiff's property to produce dealers); *Schulenberg etc. Co.* v. *R. R.* (1895) 129 Mo. 455, 459, 31 S. W. 796; *Knapp, Stone & Co.* v. *St. Louis etc. R. R.* (1894) 125 Mo. 26, 35, 28 S. W. 627; *Oetting* v. *Pollock* (1915) 189 Mo. App. 263, 269, 175 S. W. 222.

In *Christian* v. *St. Louis* (1894) 127 Mo. 109, 116, 29 S. W. 996, an injunction against the city's vacating an alley was refused because the damage was trifling, if any. And see *Gay* v. *Mutual Union Telegraph*

III. OBSTRUCTION OF PUBLIC RIGHTS.

Remedy of private individual at law. In order that a private individual may recover at law for the disturbance or obstruction of a public right,[120] it is necessary that he should have suffered actual damage thereby;[121] furthermore, in most jurisdictions the rule is laid down that the damage thus suffered must be "peculiar to him and different in kind from that to which the public is subjected."[122] This additional requirement has, how-

Co. (1882) 12 Mo. App. 485, 493 (telegraph poles not a sufficient obstruction); *Gorman* v. *R. R.* (1914) 255 Mo. 483, 496, 164 S. W. 509, 512; *Kingshighway Co.* v. *Iron Works* (1915) 266 Mo. 138, 149, 181 S. W. 30 (property not abutting).

[120]This is practically always referred to as a public nuisance. Tho the remedies of the public are the same as in cases of public nuisance proper, the difference from the standpoint of the individual is such that a separate classification and treatment was considered desirable to avoid the confusion which has crept into some of the decisions. See *post* p. 43.

[121]This seems to be assumed in all the cases, including those that reject the peculiar damage requirement; *Carver* v. *San Pedro etc. R. R. Co.* (1906) 151 Fed. 334. See 22 Harv. Law Rev. 137, 148.

[122]*Harniss et al.* v. *Bulpitt* (1905) 1 Cal. App. 140, 81 Pac. 1022. *Adler* v. *Metropolitan Elev. Ry. Co.* (1893) 138 N. Y. 173, 33 N. E. 935. See also 11 Harv. Law Rev. 66 discussing *Morris* v. *Graham* (1897) 16 Wash. 343, 47 Pac. 752 (plaintiff suffered peculiar damage in his occupation as a fisherman). In *Anglo-Algerian S. S. Co.* v. *Houlder Line* (1908) 1 K. B. 659 the plaintiff sought to recover for delay due to negligently damaging a dock which was owned by a corporation but which was by statute open to all upon the payment of dock rates. The court refused to follow the analogy of the obstruction of a public right and denied recovery; see 21 Harv. Law Rev. 544. In *Wilkinson etc. Co.* v. *McIlquam* (1905) 14 Wyo. 209, 83 Pac. 304, the defendant excluded the plaintiff from using government lands over which the public had a right to use as a common for pasturage for stock; the plaintiff failed to get relief because he suffered no peculiar damage; 19 Harv. Law Rev. 549. *Bailey* v. *Culver* (1884) 84 Mo. 531, 538; *Cummings Realty Co.* v. *Deere & Co.* (1907) 208 Mo. 66, 82, 106 S. W. 496; *Schewrich* v. *Light Co.* (1904) 109 Mo. App. 406, 421, 84 S. W. 1003; *Heer Dry Goods Co.* v. *Citizens' Ry. Co.* (1890) 41 Mo. App. 63, 74; *Shelton* v. *Lentz* (1915) 191 Mo. App. 699, 705, 178 S. W. 242; *Hisey* v. *City of Mexico* (1894) 61

ever, very slight, if any, justification,[123] and has been severely criticised.[124]

Remedy of private individual in equity. Apparently the individual is not entitled to a remedy in equity unless he could have recovered at law.[125] Whether it is sufficient in all cases

Mo. App. 248, 253 (but an awning is not necessarily an illegal obstruction); *Ellis* v. *R. R.* (1908) 131 Mo. App. 395, 399, 111 S. W. 839: "The rule is that a complainant's damage must be such as is special and peculiar to him. If his damage is of like kind with that of the general public, tho greater, he cannot recover. But it must be borne in mind that the fact that others may be in the same situation with plaintiff as regards the effect upon the use of their property, yet that will not bring her within the rule preventing her recovery. There may be others in the same block as effectually cut off by the embankment as is the plaintiff; still she may recover. Others being in like situation with her and suffering the same kind of damages does not constitute the general community in the sense of the rule just stated." *Weller* v. *Lumber Co.* (1913) 176 Mo. 243, 251, 61 S. W. 853; *In re Heffron* (1913) 179 Mo. App. 639, 654, 162 S. W. 652 (interference with land occupier's right of access to public way called a peculiar damage, etc.)

In *Morie* v. *St. Louis Transit Co.* (1905) 116 Mo. App. 12, 27, 91 S. W. 962, the plaintiff failed to get relief because a switch frog "liable to catch and hold vehicles" was not a nuisance.

[123]Coke, First Institute, 56a suggested that to allow anyone who was damaged to sue at law would lead to a multiplicity of actions and clog the courts. See 15 Col. Law Rev. 5-7 for an answer to this.

[124]For an exhaustive criticism see 15 Col. Law Rev. 1-23; 142-165; Obstruction to Public Passage, by Professor Jeremiah Smith. See also 12 Harv. Law Rev. 358 approving *Piscataqua Navagation Co.* v. *New York etc. R. R. Co.* (1898) 89 Fed. 362. The right to abate seems to be enjoyed by any one having occasion to make use of the public right; *James* v. *Hayward* (1631) Croke, Charles, 184 (removing gate across public way); or by one who suffers substantial damage. See *Gates* v. *Blincoe* (1834) 2 Dana (Ky.) 158, 26 Am. Dec. 440. *Sullivan Realty Co.* v. *Crockett* (1911) 158 Mo. App. 573, 582, 138 S. W. 924 (either private citizen or city official may abate cess pool in street if no unnecessary damage done.)

[125]*Fessler* v. *Town of Union* (1903) 67 N. J. Eq. 14, 56 Atl. 272. See also 7 Col. Law Rev. 364; 11 Harv. Law Rev. 66. *Corning* v. *Lowerre* (1822) 6 Johnson's Ch. 439. *Glaessner* v. *Anheuser Busch Assoc.* (1890) 100 Mo. 508, 516, 13 S. W. 707 (railroad track in street); *Ruckett* v. *Grand Ave. Ry.* (1901) 163 Mo. 260, 278, 63 S. W. 814; *Gorman* v. *C. B.*

that he could have recovered at law in order to be entitled to equitable relief does not seem clear, but it would seem that it is probably enough, especially in those jurisdictions that hold the peculiar damage rule.[126]

Remedy of the public—purprestures. The remedy of the public in case of an obstruction of a public right is by indictment

& *Q. R. R.* (1913) 255 Mo. 483, 495, 164 S. W. 509; *Kingshighway Supply Co.* v. *Iron Works* (1915) 266 Mo. 138, 150, 181 S. W. 30.

[126]The decisions seems to take for granted that an individual entitled to an action is entitled to equitable relief. That a plaintiff may have an injunction where damages would be inadequate is certainly true. See *Georgetown* v. *Alexandria Canal Co.* (1838) 12 Peters 91, 99. In the following cases the plaintiff was held entitled to equitable relief; *Sheppard* v. *May* (1899) 83 Mo. App. 272 (highway vacated); *McKinney* v. *Northcutt* (1905) 114 Mo. App. 146, 161, 89 S. W. 351 (obstruction of navigable stream); *Dubach* v. *R. R.* (1886) 89 Mo. 483, 489, 1 S. W. 86; *Cummings* v. *St. Louis* (1886) 90 Mo. 259, 263, 2 S. W. 130; *Baker* v. *McDaniel* (1903) 178 Mo. 447, 472, 77 S. W. 531 ("but this power is usually exercised at the instance of the public and not private individuals"); *Swinhart* v. *Ry. Co.* (1907) 207 Mo. 423, 436, 105 S. W. 1043; *Tracy* v. *Brittle* (1908) 213 Mo. 302, 317, 112 S. W. 45 (interference with public burying ground); *Wooldridge* v. *Smith* (1912) 243 Mo. 190, 204, 147 S. W. 1019 (*dictum*); *Ettenson* v. *R. R.* (1912) 248 Mo. 395, 421, 154 S. W. 785 (tracks in street); *Sherlock* v. *K. C. Belt R. R.* (1897) 142 Mo. 172, 186, 43 S. W. 629 (tracks in street); *Heer Dry Goods Co.* v. *Ry. Co.* (1890) 41 Mo. App. 63, 81; *State* v. *Saline Co. Court* (1873) 51 Mo. 350, 381. In *Givens* v. *McIlroy* (1894) 79 Mo. App. 671, 678, the plaintiff failed to get an injunction against the maintenance of a toll gate because he could not show peculiar damage.

In *State ex rel* v. *Paper Co.* (1913) 173 Mo. App. 718, 720, 160 S. W. 9 it was held that suit was properly brought by the State on relation of the owner of an adjoining building, to enjoin the maintenance of platforms in the street.

In *Versteeg* v. *Wabash R. R.* (1913) 250 Mo. 61, 73, 156 S. W. 689 the plaintiff was barred by *laches.*

In *Julia Bldg. Ass'n.* v. *Bell Telephone Co.* (1883) 13 Mo. App. 477, 486 an injunction against the maintenance of a telephone pole in the street was refused because it had been licensed by the city and was not inconsistent with the public easement.

In *Cummings Realty Co.* v. *Deere & Co.* (1907) 208 Mo. 66, 84, 106 S. W. 496 the court held that the peculiar damage requirement ap-

or injunction at the suit of the Attorney General—the same as in the case of a public nuisance proper.[127]

Where the obstruction of a public right takes the form of a permanent structure, such an encroachment is frequently called a purpresture. If a purpresture causes damage it is treated like any other obstruction of a public right.[128] Where no damage is

plied equally whether the plaintiff sought damages or an injunction. And see *Schewrich* v. *Light Co.* (1904) 109 Mo. App. 406, 421, 84 S. W. 1003; *Atterbury* v. *West* (1909) 139 Mo. App. 180, 186, 122 S. W. 1106; *Gay* v. *Mutual Union Telegraph Co.* (1882) 12 Mo. App. 485, 493, (*dictum*).

[127]See *post* p. 40. In *Attorney General* v. *Sheffield Gas Consumers Co.* (1852) 3 DeGex, McN. & G. 304 an injunction against laying gas pipes in a highway was denied because the damage was slight. In *Coosaw Mining Co.* v. *South Carolina* (1891) 144 U. S. 550 the state succeeded in preventing the removal of phosphate rock from the bed of the Coosaw River. In *State* v. *Ohio Oil Co.* (1897) 150 Ind. 21, 49 N. E. 809 the state was given an injunction against the waste of natural gas on the ground that altho the defendant's property interest in the gas was unassailable, there was a public interest against the wastage of energy which was entitled to protection. This is somewhat analogous to the obstruction of a public right.

State ex rel. v. *Vandalia* (1900) 119 Mo. App. 406, 419, 94 S. W. 1009 (obstruction in street); *State ex rel* v. *Busse* (1910) 153 Mo. App. 466, 134 S. W. 680; *State ex rel* v. *Road Co.* (1907) 207 Mo. 54, 721, 105 S. W. 752; *State ex rel* v. *Gravel Road Co.* (1905) 116 Mo. App. 175, 202, 92 S. W. 153; *State ex rel* v. *Paper Co.* (1913) 173 Mo. App. 718, 721, 160 S. W. 9. In *State ex rel v. Feitz* (1913) 174 Mo. App. 456, 160 S. W. 585 the defendant had been indicted and fined but failed to remove the obstruction; an injunction was given at the suit of the prosecuting attorney.

Or the proper public official may abate; *Heitz* v. *St. Louis* (1892) 110 Mo. 618, 626, 19 S. W. 735; *Galloso* v. *Sikeston* (1907) 124 Mo. App. 380, 101 S. W. 715.

[128]*Attorney General* v. *Richards* (1795) 2 Anstruther 603, 1 Ames Eq. Cas. 615 (defendant had erected a wharf, docks and other buildings between high and low water mark interfering with navigation and causing the harbor to fill with mud.) In *Attorney General* v. *Williams* (1899) 174 Mass. 476, 55 N. E. 77, 1 Ames Eq. Cas. 619, the defendant had erected a building in Copley Square, Boston, above the limit of height prescribed by the statute which was interpreted as giving rights to the public similar to rights in highways and navigable streams. On

caused there is a conflict of authority as to whether the State may require its removal.[129]

IV. PUBLIC NUISANCE.

Definition. A private nuisance[130] which affects a considerable portion[131] of the public becomes thereby a public nuisance.[132] The most common illustrations are nuisances which affect the health[133] and comfort[134] of the community. In recent years there

writ of error the decision was affirmed in (1899) 177 U. S. 190. In *Fessler* v. *Town of Unian* (1903) 67 N. J. Eq. 14, 56 Atl. 272, equitable relief was given to a private individua' against the erection of a fire bell in the public square because the ringing of the bell would damage the plaintiff's near-by property to a greater degree than it would the property further away.

[129]In some jurisdictions the rule is that a purpresture is not removable until it causes damage; *People* v. *Mould* (1899) 55 N. Y. Supp. 453 (wharf in the Hudson River); *People ex rel* v. *Davidson* (1866) 30 Cal. 799 (wharf in San Francisco Bay); *Attorney General* v. *United Kingdom Electric Telegraph Co.* (1861) 30 Beav. 287 (telegraph wires in highway.) In other jurisdictions a purpresture is removable at any time. *Attorney General* v. *Smith* (1901) 109 Wis. 532, 85 N. W. 512 (pier in shallow waters of navigable lake.) See 1 Col. Law Rev. 408.

[130]See *ante* p. 3.

[131]Bell ringing may be a private nuisance to those living very close but not a public nuisance because to those farther away the ringing of the bells is pleasing instead of annoying. *Soltau* v. *DeHeld* (1851) 2 Sim. (N. S.) 133.

[132]In this subdivision will be considered public nuisances in the narrow sense, not including obstructions of a public right, which are discussed *ante* p. 36.

[133]*Attorney General* v. *Hunter* (1826) 1 Devereaux (N. C.) 12, 1 Ames Eq. Cas. 621 (mill pond); *Attorney General* v. *Manchester* (1893) 2 Ch. Div. 87 (small pox hospital). In *Everett* v. *Paschall* (1910) 61 Wash. 47, 111 Pac. 879 a tuberculosis sanatorium was held to be a nuisance tho there was no actual danger of infection. For a criticism of the decision see 24 Harv. Law Rev. 407, 11 Col. Law Rev. 292.

[134]*Duke of Grafton* v. *Hilliard* (1736) 1 Ambler 160, note (smoke from brick kiln); *Cronin* v. *Bloemecke* (1899) 58 N. J. Eq. 313, 43 Atl. 605, 1 Ames Eq. Cas. 560 (noise of disorderly crowds attracted by baseball game.)

has been legislation in some states in protection of public morals declaring certain things to be public nuisances which would be neither private nor public nuisances apart from such statute.[135] There has been a tendency to recognize the protection of the public morals as a legitimate field for equitable interference without a statute,[136] and also a slight tendency thus to recognize public aesthetics.[137]

Remedy of the public. At common law the remedy of the public is by indictment.[138] The equitable remedy is sought either

[135]Most of this legislation has been aimed at saloons. See *Littleton* v. *Fritz* (1885) 65 Iowa 488, 22 N. W. 641, 1 Ames Eq. Cas. 31 holding such a statute constitutional. It has been held that such a statute does not authorize a private individual to abate; *State* v. *Stark* (1901) 63 Kan. 529, 66 Pac. 243; 15 Harv. Law Rev. 415.

In *State ex rel* v. *Uhrig* (1883) 14 Mo. App. 413 the court refused to enjoin an unlicensed saloon tho it was a public nuisance.

[136]These are chiefly cases of injunctions against allowing prize fights to be held; *Attorney General* v. *Fitzsimmons* (Ark., 1896) 35 Amer. Law Register, 100, 1 Ames Eq. Cas. 622; *Com'th* v. *McGovern* (1903) 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

State ex rel v. *Canty* (1907) 207 Mo. 439, 459, 105 S. W. 1078 (bull fight) *State ex rel* v. *Moon* (1918) 202 S. W. 609; *State ex rel* v. *Lamb* (1911) 237 Mo. 437, 456; 141 S. W. 665 (disorderly house); *State ex rel.* v. *Jones* (1918) 202 S. W. 606. See *ex parte Laymaster* v. *Goodin* (1914) 260 Mo. 613, 619, 68 S. W. 754 (injunction refused against bawdy house because not a public nuisance); *State ex rel* v. *Moffett* (1910) 194 Mo. App. 286, 291, 188 S. W. 930 (injunction refused against wholesale liquor house because not shown to be a public nuisance); *State ex rel* v. *Kirkwood Club* (1916) 187 S. W. 819; *State ex rel* v. *R. R.* (1917) 191 S. W. 1051; *State ex rel* v. *Woolfolk* (1916) 269 Mo. 389, 395, 190 S. W. 877.

[137]See 20 Harv. Law Rev. 35-45; 8 Col. Law Rev. 226; 21 Harv. Law Rev. 445.

[138]As a matter of substantive law a public nuisance is usually not a crime in the narrow sense but a public tort. But the state has found it more convenient to use the machinery of the criminal law than to bring an action on the case for damages. Where a public nuisance involves a breach of the peace—as for example, a prize fight—there is a crime in the narrow sense and hence in *Attorney General* v. *Fitzsimmons supra* no injunction was issued against the principals in the prize fight on the ground that the normal remedy against them was by indictment for a misdemeanor.

by the state[139] or by a municipality[140] to which such power has been delegated. If the municipality is itself guilty of maintaining a public nuisance, the state[141] is obviously the proper party to ask for relief.

Remedy of private individual. The fact that a private nuisance is also a public nuisance because it affects a large portion of the public should not in any way diminish what would otherwise be the rights and remedies of the private individual and this seems to be the prevailing view.[142] In a few cases, however, the

[139]Usually through a bill filed by the Attorney General. In Missouri such suits are brought by the prosecuting attorney; *State ex rel* v. *Lamb* (1911) 237 Mo. 437, 451, 141 S. W. 665; *State ex rel* v. *Excelsior Powder Co.* (1914) 259 Mo. 254, 271, 169 S. W. 267 (powder magazine close to village). That the public is not barred by laches or the statute of limitations see *State ex rel* v. *Excelsior Powder Co. supra* at page 284; but a private individual is apparently barred; see *Skinner* v. *Slater* (1911) 159 Mo. App. 589, 592, 141 S. W. 733; *Smith* v. *Sedalia* (1899) 152 Mo. 283, 300, 53 S. W. 907; *Schumaker* v. *Shawhan* (1902) 93 Mo. App. 573, 579, 67 S. W. 717.

[140]See 23 Harv. Law Rev. 645; 26 Id 371; *City of Kansas* v. *McAleir* (1888) 31 Mo. App. 433 (city also had power under charter to declare what is nuisance.) But not if city itself created the nuisance on the defendant's land; *City of Hannibal* v. *Richard* (1889) 35 Mo. App. 15, 21.

[141]*Cm'th of Pennsylvania* v. *East Washington* (1911) 60 Pittsburg Leg. J. 300 (city sewage plant a public nuisance). In *Georgia* v. *Tennessee Copper Co.* (1907) 206 U. S. 230 the State of Georgia, suing in the U. S. Supreme Court was held entitled to an injunction against the discharge of noxious gases by a Tennessee Corporation across the state line; tho damages might have been an adequate remedy for a private person, a state was not required to part with its *quasi* sovereign rights for damages. See 21 Harv. Law Rev. 132, 144, 7 Col. Law Rev. 617.

See *State ex rel* v. *Hager* (1886) 91 Mo. 452, 455, 3 S. W. 844. If after a reasonable time the city does not abate a nuisance in a public street, the city becomes liable for consequences as if it had itself created the nuisance; *Roth v. City of St. Joseph* (1912) 164 Mo. App. 26, 30, 147 S. W. 490.

[142]*Cronin* v. *Bloemecke* (1890) 58 N. J. Eq. 313, 1 Ames Eq. Cas. 560 (base ball game). See also *Bellamy* v. *Wells* (1890) L. J. Ch. D. 156 (disorderly boxing contest.)

confusion[143] resulting from calling the obstruction of a public right a public nuisance has caused the courts to require that in order to get relief from a public nuisance in the narrow sense the private individual must show peculiar damage not suffered by the public in general.[144]

GEORGE L. CLARK.

[143]For a clear statement of the distinction see *Wesson* v. *Washburn Iron Co.* (1860) 13 Allen (Mass.) 95, 90 Am. Dec. 181.

[144]*Cranford* v. *Tyrrell* (1891) 128 N. Y. 341 (bawdy house). See also *Myers* v. *Malcolm* (1844) 6 Hill (N. Y.) 292, 41 Am. Dec. 744 (action on the case for explosion of quantity of gunpowder kept in village). Even in cases of obstruction of a public right, the requirement of peculiar damage has been criticized. See also *ante* p. 36.

Unfortunately the confusion has apparently pervaded the Missouri decisions; *Hayden* v. *Tucker* (1866) 37 Mo. 214, 221; *Schoen* v. *Kansas City* (1895) 65 Mo. App. 134, 138 (sewage); *Warren* v. *Cavanaugh* (1888) 33 Mo. App. 102, 109 (stone quarry); *Hodson* v. *Walker* (1913) 170 Mo. App. 632, 637, 157 S. W. 104 (bawdy house); *Smith* v. *McConathy* (1848) 11 Mo. 517, 521 (distillery and hog pens); *Bothe* v. *R. R.* (1914) 181 Mo. App. 720, 723, 164 S. W. 709 (noisy coal chute).

The mere fact that a city has declared to be a nuisance a frame building within the fire limits of the city does not entitle a private individual to enjoin. *Rice* v. *Jefferson* (1892) 50 Mo. App. 464, 471.